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No. _____

In The

Supreme Court of the United States

October Term, 1988

JOHN R. WILSON, ET AL.,

Cross-Petitioners,

vs.

THE OMAHA INDIAN TRIBE,

Cross-Respondent

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Whether Title 25, U.S. Code § 194, which places the burden of proof on the "white person" in a suit by "an Indian" over title to property, is unconstitutional because it constitutes invidious racial discrimination in favor of Indians and Indian Tribes, and against other person in violation of the due process clause of the Fifth Amendment.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the courts below are: The United States of America and the Omaha Indian Tribe, who were the plaintiffs, and John R. Wilson (the personal representative of Roy Tibbals Wilson, now deceased), Charles E. Lakin, Florence Lakin, Harold Jackson, RGP, Inc., and Otis Peterson, who were defendants and who are the Cross-Petitioners herein. Other defendants in the proceedings below are Darrell L. Sorenson, Harold Sorenson, Harold M. Sorenson, Luea Sorenson, Travelers Insurance Company, the State of Iowa, and the State Conservation Commission of the State of Iowa.

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John R. Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, RGP, Inc. and Otis Peterson, who are respondents as to the Petition of the Omaha Indian Tribe in No. 88-1426 cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the court of appeals is reproduced as Appendix C to the Petition of the Omaha Indian Tribe in No. 88-1426. The opinion is reported as

Omaha Indian Tribe v. Jackson, 854 F.2d 1089 (8th Cir. 1988). The Final Judgment and Decree of the district court is Appendix A to the Petition of the Omaha Indian Tribe. The most recent memorandum and order of the district court is reported as *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa 1984). Other opinions of the lower courts in this case are: *United States v. Wilson*, 433 F.Supp. 57 (N.D. Iowa W.D. 1977); *United States v. Wilson*, 523 F.Supp. 874 (N.D. Iowa W.D. 1981); *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978); *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir. 1980); *United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982). This case has also been before this Court, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).

JURISDICTION

On February 28, 1989, the Omaha Indian Tribe filed a timely Petition For Writ of Certiorari in No. 88-1426 asking for review of the judgment of the court of appeals entered on August 12, 1988. The Tribe invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1). The Cross-Petitioners received the Petition on March 3, 1989. This Cross-Petition is filed pursuant to Rule 19.5 of the Rules of The Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 25 § 194. *Trial of right of property; burden of proof.*

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. § 2126.

Derivation. Act of June 30, 1834, C.161, § 22, 4 Stat. 733.

United States Constitution, Amendment V, Due Process Clause.

> No person shall . . . be deprived of life, liberty or property, without due process of law;

STATEMENT OF THE CASE

This case is a consolidation of suits brought by the Omaha Indian Tribe and the United States as trustee for that Tribe, to quiet title to certain Iowa farm land as being part of the Omaha Indian Reservation. The reservation was established on the Nebraska side of the Missouri River pursuant to a treaty of 1854.

The complaint of the Tribe invoked the jurisdiction of the district court under 28 U.S.C. § § 1331 and 1362. The complaint of the United States invoked the jurisdiction of the district court under 28 U.S.C. § 1345.

The critical factual issue in the case was whether the Missouri River moved over an area, referred to as the Barrett Survey, in an avulsive or accretive manner at various times since 1854. If the movements were avulsive in nature the original reservation boundaries would remain unchanged and the United States and the Tribe would prevail. If the movements were accretive, the land

in question would be Iowa riparian land; it would not be a part of the reservation; and the defendants would prevail. The district court, applying normal burden of proof requirements, placed the burden of proof on the United States and the Tribe; found the movements to be accretive; and held for the defendants, Cross-Petitioners herein.[1] The Eighth Circuit Court of Appeals held that 25 U.S.C. § 194 applied to place the burden of proof on the defendants and reversed.[2]

This case was previously before this Court in 1978 pursuant to its grant of the Petition for Writ of Certiorari of Cross-Petitioners *Wilson, et al.*, (No. 78-160) limited to two questions presented by that petition which were:

> Whether the Eighth Circuit erroneously construed Title 25 U.S.C. § 194 to make it applicable in this case.
>
> Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case.

The Court did not grant certiorari on the question of the constitutionality of 25 U.S.C. § 194 presented in the petition of defendants RGP, Inc. and Otis Peterson in No. 78-162.

In its opinion in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), this Court construed 25 U.S.C. § 194 to be applicable to place the burden of proof upon the defendants in this case, except for the State of Iowa to which

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[1] *United States v. Wilson*, 433 F.Supp 57 and 433 F.Supp. 67 (N.D. Iowa W.D. 1977).

[2] *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978).

the Court held section 194 would not apply; found federal law of accretion and avulsion was controlling, but that the law of Nebraska should be borrowed as the federal rule of decision in this case; and remanded this case to the court of appeals to consider whether the district court had correctly interpreted Nebraska law and had properly applied it to the facts in this case.

The court of appeals on remand again vacated the judgment of the district court, which had quieted title in defendants, and remanded the case to that court with directions to enter judgment quieting title to the trust lands involved, except those claimed by the State of Iowa, in the United States, as trustee for the Tribe.[3]

On remand the district court, on September 8, 1981, entered a Memorandum Opinion and Order quieting title in the United States and the Tribe and ruling adversely to Cross-Petitioners on issues raised by them concerning the title status of certain lands within the Barrett Survey which had been patented in fee and the entitlement of Cross-Petitioners to reimbursement for improvements made to the land.[4]

On appeal to the Eighth Circuit the Cross-Petitioners, in addition to appealing from the adverse rulings on the fee patent land and improvement issues, raised the issue of the constitutionality of 25 U.S.C. § 194, the application of which was a determinative factor in the adverse ruling

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[3] *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir. 1980) *cert. denied* 449 U.S. 825 (1980).

[4] *United States v. Wilson*, 523 F.Supp. 874 (N.D. Iowa 1981).

on the issue of ownership of the entire land in controversy. The court of appeals reversed on the issues of fee patent land and improvements and remanded the case once again to the district court for further proceedings but made no ruling on the issue of the constitutionality of 25 U.S.C. § 194.[5] This Court denied Cross-Petitioners Petition For a Writ of Certiorari from that decision seeking review by this Court of the constitutionality of 25 U.S.C. § 194.[6]

On January 13, 1984 the district court issued its Memorandum decision finding that no party having the burden of proof in this case could sustain that burden.[7] Accordingly, the district court held that title to approximately 1900 acres of land within the Barrett Survey would be quieted in the United States as Trustee for the Tribe conditioned upon the reimbursement by the United States to the Cross-Petitioners for permanent improvements to the land made by them and their predecessors; quieted title in the State of Iowa to approximately 670 acres; and quieted title in the Cross-Petitioners to approximately 300 acres of fee patent land. On May 29, 1987 the district court entered its Final Judgment and Decree, as modified on June 30, 1987, consistent with the Memorandum (App.B p16a).[8] From this Final Judgment and Decree

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[5] *United States v. Wilson*, 707 F.2d 304, as modified on rehearing, 707 F.2d 311 (8th Cir. 1983).

[6] *United States v. Wilson*, 465 U.S. 1025 (1983).

[7] *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa 1984).

[8] References to (App.___ p___) are to the Appendix exhibit and page of the Appendix to the Petition For Writ of Certiorari of the Omaha Indian Tribe in 88-1426.

the Tribe and the United States appealed separately to the court of appeals, and the Cross-Petitioners cross appealed seeking, once again, a review of the constitutionality of 25 U.S.C. § 194. The court of appeals upheld the constitutionality of 25 U.S.C. § 194, *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988) (App.C). The Tribe in No. 88-1426 has petitioned for a writ of certiorari with respect to this ruling of the court of appeals. The Cross-Petitioners in this Cross-Petition seek a writ of certiorari on the question of the constitutionality of 25 U.S.C. § 194.

REASONS FOR GRANTING THE CROSS-PETITION

The decisive impact of 25 U.S.C. § 194 on this litigation has been noted by both the district court and the court of appeals.[9] The district court in its 1984 Memorandum decision, on the basis of which the Final Judgment and Decree was entered, summed up the impact of the statute as follows:

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[9] The court of appeals stated: "We recognize that to require the defendants to prove the cause of the river's movements occurring some 100 years after the event is indeed an onerous burden." *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 651. The district court observed:

> There can be no doubt, however, that 25 U.S.C. § 194 has been a determinative factor in the outcome of this case. In the appellate stages of this proceeding, this previously untested statute operated to shift the ordinary burden of proof in a quiet title action to the individual defendants. This enormous burden included the task of describing the nature of river movements which occurred beginning over 100 years ago.

United States v. Wilson, 523 F.Supp. 874, fn. 19.

> After eight years of litigation and appeals, land ownership in this case is not decided on the merits. All disputes involving the 2900 acres of land are settled simply by the apportionment of the burden of proof. The Tribe originally won its claim to 2200 acres because of the allocation of the burden which resulted from application of Section 194. The court of appeals held that the defendants claiming the 2200 acres simply failed to meet the burden according to the court of appeals. The State of Iowa and defendants claiming fee patent land prevail here because of application of the burden of proof, absent the aid of Section 194. The Tribe failed to sustain its burden.
>
> The Court happened upon an ancient legal maxim which appears appropriate here, "Idem est non probari et non esse; non deficit jus, sed probatio." Roughly translated, "What is not proved and what does not exist are the same; it is not a defect of law, but of proof." Black's Law Dictionary, 5th ed. (1979). (App.A p15a)

Although Section 194, which allocates the burden of proof based upon the race of the parties, would seem almost to compel a thorough constitutional review, the constitutionality of that statute has received only slight attention in this case. In a footnote to the first opinion of the court of appeals, the constitutional question was dismissed with a brief reference to this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974).[10] The court of appeals, though asked again to consider this issue in

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[10] In footnote 18 to its opinion in *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 631 (1978) the court of appeals said:

(Continued on following page)

United States v. Wilson, 707 F.2d 304 (8th Cir. 1982) failed even to mention it. When raised for a third time in *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988), the court disposed of the question in one brief paragraph:

> Finally, the private defendants claiming non-fee patent reservation land held in trust by the government maintain that 25 U.S.C. § 194 effects an invidious discrimination on the basis of race contrary to the due process clause of the fifth amendment. We cannot agree. This court's decision in *Omaha I* with respect to this issue is the law of the case, and the private defendants have provided no basis which either compels or justifies this court's reconsideration. *See*, 575 F.2d at 631 n. 18; *see also Handi Inv. Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir. 1981) (citing *Kimball v. Callahan*, 590 F.2d 768, 772 (9th Cir.) *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979); *White v. Murtha*, 377 F.2d 428 (5th Cir. 1967). (App.C p47a)

(Continued from previous page)

The defendants question the constitutionality of 25 U.S.C. § 194. In discussing the validity of laws granting special treatment to Indians the Supreme Court emphasized in *Morton v. Mancari*, 417 U.S. 535, 554-55, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290 (1974), that:

> On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. This unique legal status is of long standing and its sources are diverse. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

Rather than face the constitutional issue squarely the court chose to ignore it, rationalizing that its earlier treatment of the subject in a footnote was "law of the case."[11]

In upholding the constitutionality of 25 U.S.C. § 194 the court of appeals has, within the meaning of Rule 17.1(c) of the Rules of the United States Supreme Court, "decided an important question of federal law which has not been, but should be settled by this Court," and it has decided that question "in a way in conflict with applicable decisions of this Court."

The potentially enormous impact of Section 194 in future cases involving Indian land claims should be apparent. The reversal of the burden of proof in such cases will be triggered under the statute whenever the Indian or Indian Tribe, or the United States as its "champion," demonstrates that it was "once in possession of or had title to the area in dispute."[12] As the circumstances of this case demonstrate, the remoteness in time of the last Indian possession is immaterial. Any tribal possession in the instant case ceased at least by 1912. With respect to much of the land within the Barrett Survey, it ceased even before that as the Missouri River moved back and forth across the area in the latter part of the 19th century.

The reversal of the normal burden of proof requirements coupled with the inability of defendants in cases

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[11] The Cross-Petitioners, it should be noted, did not raise the constitutional issue on the first appeal, nor would they have had any reason to, since they were appellees, having obtained a judgment from the district court dismissing the plaintiffs' quiet title actions.

[12] *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 668.

such as this to rely upon statutes of limitations or laches defenses, creates almost insurmountable obstacles to the defense of Indian land claims brought by the Tribes or the United States.[13] When the full resources of the United States government are brought to bear on behalf of the Indian claimants, as they have been in this case, the burden is overwhelming.

The instant case demonstrates exactly the consequences of a combination of these forces. The ultimate determination of the lower courts in this case is that neither side in this litigation has been able to convincingly demonstrate the nature of river movements occurring almost a century ago which are critical to this case. The evidence on both sides has necessarily involved the "educated guesses" of expert witnesses which the court of appeals has found to be speculative and not sufficient to sustain a burden of proof.[14] Nevertheless, because Section 194 automatically places the burden of proof on the defendants, the United States and the Tribe are able to

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[13] The federal courts have consistently held that limitations defenses cannot be asserted against Indian land claims brought by tribes or the United States. *See*, e.g. *United States v. 7,504.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938); *Oneida Indian Nation of New York v. County of Oneida*, 434 F.Supp. 527 (N.D. N.Y. 1977); *Schaghticoke v. Kent School Corp.*, 423 F.Supp. 780 (D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co.*, 418 F.Supp. 798 (D.Rhode Island 1976).

[14] The court of appeals in its second opinion, *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153, 1160, commented: "Evidence of river movements in the critical periods too often gives no more than a basis for an 'educated guess', in the words of defendant's expert witness, Dr. George Hallberg."

reclaim land on the Iowa side of the Missouri River which the Tribe had neither occupied nor claimed for almost a half century before instituting this litigation.

The constitutional validity of 25 U.S.C. § 194, it is submitted, is a question of great significance to all pending and future litigation involving Indian land claims. The instant case shows so clearly the impact that Section 194 can have on that type of litigation. It presents a very appropriate context in which to examine the constitutionality of the racial preference granted by Section 194.

This Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) is the most recent consideration by this Court of the constitutionality of an Act of Congress which mandates a preference based upon race. *Fullilove* is placed in still sharper focus by the Court's very recent decision in *City of Richmond v. Croson*, ___ U.S. ___ (1989). Unlike racially preferential "remedial" state action which, under the plurality opinion in *Croson*, must meet the traditional "compelling governmental interest" and "narrowly tailored means" tests, similar federal action is subject to a less stringent review. Under *Fullilove*, the analysis is twofold. The first inquiry must be "whether the *objectives* of the legislation are within the power of Congress."[15] Second, it must be determined "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objective . . . "[16] The Court recognized the "need for careful judicial evaluation to assure that any

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[15] *Fullilove v. Klutznick*, 448 U.S. 448, at 473.

[16] *Id.* at 473.

congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal."[17]

It is submitted that 25 U.S.C. § 194 fails to meet any of the standards of *Fullilove*. The statute operates directly to disadvantage the white person or non-Indian in disputes with Indians over property rights. There is no articulated basis in the legislative history of this statute which reveals the "objective" which the Congress intended to further in enacting this statute. In fact, as this Court has conceded, there is no legislative history at all upon which to rely in ascertaining the Congressional intent or purpose underlying that statute. "The legislative history here is uninformative, and executive interpretation is unhelpful with respect to this dormant statute." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667.

Without such an articulated objective, it cannot be determined, under the tests of *Fullilove*, whether that objective is within the power of Congress and whether the racial preference granted in that statute is a constitutionally permissible means for accomplishing that objective.

The court of appeals in its only comment upon the constitutionality of Section 194 referred to this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974). *Morton* upheld a statute granting Indians an employment preference with the Bureau of Indian Affairs. The court of appeals interpreted *Morton* as supporting the proposition

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[17] *Id.* at 479.

that Indians may be singled out by Congress "for particular and special treatment." *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 631 n.18. *Morton* cannot be read so broadly. The Court in *Morton* was careful to emphasize that the employment preference at issue was a "political" preference and not a racial preference in that the special treatment was accorded to Indians not as a racial group, but as members of quasi-sovereign tribal entities.[18] Subsequent cases upholding special Indian legislation in the face of equal protection challenges do so on the grounds that the special treatment is not based upon race but upon the unique legal status of Indian tribes vis-a-vis the United States. The distinction is stated in *United States v. Antelope*, 430 U.S. 641, 646 (1977).

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[18] *Morton v. Mancari*, 417 U.S. 535, 553, 554 (1974). The limits of the type of classification approved in *Morton* was stressed again in the Court's opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978):

> Petitioner also cites our decision in *Morton v. Mancari*, 417 U.S. 535, 41 L.Ed.2d 290, 94 S.Ct. 2474 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari*, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is sui generis. *Id.*, at 554, 41 L.Ed.2d 290, 94 S.Ct. 2474. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion." *Ibid.*
>
> 438 U.S. 265, 304 fn.42

> Both *Mancari* and *Fisher* involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests. But the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "'racial' group consisting of 'Indians' . . . ." *Morton v. Mancari, supra,* at 553 n.24, 94 S.Ct., at 2484.

In contrast with the legislation examined and upheld in *Morton,* and *Antelope,* and also in *Fisher v. District Court,* 424 U.S. 382 (1976)[19] and *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73 (1977),[20] 25 U.S.C. § 194 has nothing to do with the political relationship between Indian tribes and the United States or between the individual Indian and the tribe. The statute draws a bright racial line. It is cast in terms of "an Indian" – literally an individual Indian – and a "white person." The preference is granted to the Indian regardless of tribal status. It

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[19] *Fisher* involved the exclusive jurisdiction of tribal courts under the Indian Reorganization Act, 25 U.S.C. § 476, which precluded access to state courts in adoption matters involving tribal Indians.

[20] *Weeks* involved Congressional legislation, 25 U.S.C. §§ 1291-1297, authorizing distribution of funds to certain Delaware Indians but excluding others.

directly prefers the Indian whose property interests come in conflict with those of the non-Indian. The "property" referred to in the statute is not limited to tribal or reservation property. Indeed, so broad is the statute that it could very well apply in a fence dispute between Indian and non-Indian neighbors owning adjoining residential lots in a city. In no sense is the classification of Section 194 "political" in nature so as to justify application of the more liberal standard of review enunciated in *Morton, Weeks, Fisher,* and *Antelope.*

Finally, 25 U.S.C. § 194 does not even meet the standard of *Morton,* were that standard to apply. The preference granted in Section 194 cannot be said to be "tied rationally to the fulfillment of Congress' unique obligation toward Indians." The Court, even where it has applied this more liberal standard, has cautioned that it will "scrutinize Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment," *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 84 (1977). No such judicial scrutiny of 25 U.S.C. § 194 has taken place in this case.

Implicit in the Court's decision in *Wilson v. Omaha Indian Tribe, supra,* is that the original purpose of the statute when it was enacted in 1834 was to provide remedies against non-Indian squatters on Indian land by offsetting any unfair advantage the non-Indian might have. However, the statute is certainly not "narrowly tailored" to accomplish this purpose if, indeed, that is its purpose. Even if the statute may once have had a "rational tie," that tie has been lost as Indians have attained much greater access to the courts and much greater resources with which to litigate land ownership claims.

As is so clearly apparent from the circumstances of the instant case, the Indian plaintiffs have been able to enlist the vast resources of the United States Department of Justice and the Bureau of Indian Affairs in litigating the title claim. The United States, in fact, is the original plaintiff and brought suit on behalf of the Tribe. Section 194, by reversing the normal burden of proof in a case such as this, has only served to give the United States and the Tribe a further and unconscionable advantage. Surely, in these circumstances, the statute serves no purpose in offsetting any "advantage" presumed to exist on the side of the non-Indian claimant.

Furthermore, if the purpose of 25 U.S.C. § 194 is to equalize the relative positions of the Indian and non-Indian litigant, this purpose is hardly served by exempting from its coverage a state – whose "advantage" over the Indian would seem even more decisive – as was done in *Wilson*.

The application of 25 U.S.C. § 194 has produced in this case precisely the kind of irrational result which might be expected when a case is decided on the basis of who the litigants are rather than upon the truth of their claims. Although the Missouri River moved in the same way (whether by avulsion or accretion) over all of the Barrett Survey land in controversy at the various times in question,

(a) Iowa will retain ownership of its land because Section 194 does not apply to it;

b) Cross-Petitioners will retain the fee patent land because Section 194 does not apply within this "area";

(c) Cross-Petitioners will lose the rest of the land because they are "white persons," and Section 194 applies to them.

CONCLUSION

The result in this case is the best demonstration, if any is needed, why this Court should grant this Cross-Petition and undertake a complete constitutional review of the racial preference granted in 25 U.S.C. § 194.

RESPECTFULLY SUBMITTED,

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Attorney for Omaha Indian Tribe of Nebraska, Cross-Respondent

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QUESTIONS PRESENTED

Whether the question of *res judicata* precludes the Court's consideration of the issues presented in the Cross-Petition of Lakin, Wilson, R.G.P., Inc., *et al.*, by reason of these facts:

(1) Cross-Respondent Omaha Indian Tribe and Cross-Petitioners Lakin, Wilson, R.G.P., Inc., *et al.*, joined issue by their pleadings in the case of *Omaha v. Wilson*, C 75-4067, and fully tried both the issues of fact and law respecting their claims to title to the 6390 acres of land of which the Blackbird Bend Meander Lobe is comprised;

(2) The district court, in its *Blackbird Bend I* decision entered the "basic finding essential" to Cross-Petitioners' case that (a) the Blackbird Bend area had been totally washed away and (b) totally replaced by accretions to the Iowa riparian land;

(3) The Court of Appeals in OMAHA I reversed the "basic finding essential" to Cross Petitioners' case, declaring that the finding was clearly erroneous and not supported by evidence; and

(4) The Court in *Wilson v. Omaha* affirmed the decision in OMAHA I that Cross-Petitioners pursuant to 25 U.S.C. 194, had failed to sustain their burden of proving that the Blackbird Bend lands to which they claimed title are accretions to the Iowa riparian bank and that they derived their titles from the owners of that riparian land?

Whether Cross-Petitioner Iowa (88-1636), having expressly admitted and Cross-Petitioners Lakin, Wilson, R.G.P., Inc., *et al.*, having impliedly admitted that Evan L. Hultman, as Attorney General for the

State of Iowa, had participated in a "quiet-title suit" among Cross-Petitioner Iowa and Cross-Petitioners Lakin and Peterson (R.G.P., Inc.) involving the "same area" of the Blackbird Bend Meander Lobe concerning which Evan L. Hultman forced his representation upon Cross-Respondent Tribe, the Court should not first resolve the issue of fraudulent representation of the Tribe prior to considering the issue of the Constitutionality of 25 U.S.C. 194?

PARTIES TO THE PROCEEDINGS

A list of all parties to the proceedings in the court whose judgment is sought to be reviewed:

John R. Wilson; Charles E. Lakin, Florence Lakin; R.G.P., Inc., an Iowa Corporation; Harold Jackson; Otis Peterson; Darrell L., Harold, and Luea Sorenson; State of Iowa and Iowa Department of Natural Resources.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1592

JOHN R. WILSON, ET AL.,
Cross-Petitioners,

vs.

THE OMAHA INDIAN TRIBE,
Cross-Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-Respondent Omaha Indian Tribe respectfully opposes the Cross-Petition filed by John R. Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, R.G.P., Inc., and Otis Peterson seeking to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The United States District Court for the Northern District of Iowa entered its Memorandum Opinion on January 13, 1984,[1] holding that Petitioner Omaha In-

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[1] Appendix A, *United States v. Wilson; Omaha v. Jackson, et al.; Omaha v. Agriculture* (hereafter referred to as Omaha v. Wilson) 578 F. Supp. 1191 (U.S.D.C.N.D. Iowa W.D. 1984), p. 5a.

dian Tribe could not prevail against the State of Iowa as to any lands claimed by Respondent Iowa or concerning fee-patented lands claimed by private Respondents. That Memorandum Opinion is Appendix A of this Petition. Subsequently the District Court, on May 29, 1987, entered its Final Judgment and Decree, which was amended June 30, 1987.[2] That Final Judgment and Decree is Appendix B of this Petition. Petitioner Omaha Indian Tribe appealed the Memorandum Opinion (Appendix A) and the Final Judgment and Decree (Appendix B) to the United States Court of Appeals for the Eighth Circuit. That Court of Appeals rendered its opinion on August 12, 1988.[3] That Opinion is Appendix C of this Petition. On November 10, 1988, the Court of Appeals entered its Order denying the Petition for Rehearing *en banc*. That Order is Appendix D of this Petition.[4] On January 18, 1989, the Supreme Court entered an Order extending the time to file this Petition to and including February 28, 1989. That Order of the Supreme Court is Appendix E of this Petition.[5] In addition to the Opinions and Final Judgment referred to above there are these Opinions, Findings of Fact, and Conclusions of Law to which reference is necessary in

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[2] Appendix B, Final Judgment and Decree, May 29, 1987, *United States v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agricultural . . . Wilson;* Order June 30, 1987, Amending Final Judgment and Decree, p. 16a.

[3] Appendix C, *Omaha Indian Tribe v. Jackson; Omaha v. . . . Wilson*, 854 F.2d 1089 (CA 8, 1988), p. 37a.

[4] Appendix D, Order dated November 10, 1988, p. 49a.

[5] Appendix E, Order of Supreme Court dated January 18, 1989, p. 50a.

determining the grounds of the Final Judgment and the Opinions of the courts below:

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit, as stated above, was rendered on August 12, 1988, the Order denying Petitioner Tribe's motion for rehearing en banc was entered November 10, 1988, and the period for filing was extended by the Court to and including February 28, 1989.[7] The Court's ju-

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[5] Opinion of the District Court, dated September 4, 1981, declaring that Petitioner Omaha Indian Tribe had proved its valid claim to title to the 700 acres involved against Respondent Iowa and Respondents Lakin, et al. That Opinion is Appendix F of this Petition: Re: *United States v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agriculture* . . . Wilson, 523 F.Supp. 874 U.S.D.C.N.D. Iowa W.D. 1981). On June 20, 1979, the Supreme Court upheld Petitioner Tribe's assertion that Respondents had the burden of proof pursuant to 25 U.S.C. 194. That Supreme Court Decision is Appendix H of this Petition: *Wilson v. Omaha*, 442 U.S. 653 (1979). The Supreme Court's Decision affirmed the Opinion of the Court of Appeals, applying 25 U.S.C. 194. That Court of Appeals Opinion is Appendix I of this Petition: *Omaha v. Wilson*, 575 F.2d 620 (CA 8, 1978). The Court of Appeals, Appendix I, reversed the District Court's Opinion declaring that the Respondents had sustained their burden of proof against Petitioner Tribe. That Opinion of the District Court was entered May 4, 1977 and is Appendix J of this Petition: *United States v. Wilson*, 433 F.Supp. 57 (U.S.D.C.N.D. Iowa W.D. 1977). The Court of Appeals Opinion, Appendix I, likewise reversed the Findings of Fact and Conclusions of the District Court, which found as a fact and concluded as a matter of law that Petitioner Tribe had failed to sustain its burden of proof. That district Court's Findings of Fact and Conclusions of Law are Appendix K of this Petition: *United States v. Wilson*, 433 F.Supp. 67 (U.S.D.C.N.D.Iowa W.D. 1977).

[7] *See*, Appendices D and E.

risdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3.

> The Congress shall have power to regulate Commerce . . . with the Indian Tribes; . . .

STATUTORY PROVISIONS INVOLVED

25 U.S.C. Sec. 194. Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. § 2126.

RULE 15(b), Federal Rules of Civil Procedure

(b)Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the

presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

STATEMENT OF THE CASE
INTRODUCTION

Antecedent to addressing the specific issue of the Constitutionality of 25 U.S.C. 194, it is essential first to define and to clarify the precise status of the litigation originally before the Court resulting in the decision of *Wilson* v. *Omaha*. Reference in that regard is made to the fact that Cross-Respondent Omaha Indian Tribe, by its Petition in 88-1426, reviews in specific detail the fact that there was fully tried in the district court in Cross-Respondent's case of *Omaha* v. *Wilson* the title to the full 6390 acres involving the Blackbird Bend Meander Lobe.[8]

As part of Cross-Respondent Tribe's case in chief in *Omaha* v. *Wilson*, Tribe proved by unchallenged evidence that title to lands within the "Barrett Survey Meander Line" totalling 306 acres of fee patented lands claimed here by Cross-Petitioners Lakin, Wilson, and R.G.P., Inc., *et al.*, resides in Cross-Respondent Tribe by reason of the fact that those approximately 306 acres are and for all periods of time relevant to these proceedings were accretions to

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[8] Pet. No. 88-1426, p. 9; Cross-Respondent Tribe's Quiet Title Action, *Omaha v. Wilson*.

Cross-Respondent Tribe's trust lands and that the title resides in the Tribe to those lands today.[9]

Under the present final decree, those approximately 980 acres [referred to by the Court and the Court of Appeals as 700 acres] of land have been apportioned between the State of Iowa and Cross-Petitioners on this basis:

State of Iowa	672.93 acres
Other Cross-Petitioners	306. acres[10]

PARCEL 1 AND PARCEL 2 DEFINED FOR CLARITY

In an effort separately to present the issues in the two Cross-Petitions and to avoid confusing the issues, Cross-Respondent Tribe refers to Parcel 1 and Parcel 2 and the decisions which pertain to them:

PARCEL 1: This tract encompasses the full 6390 concerning which Petitioner Tribe in its complaint in *Omaha* v. *Wilson*, C 75-4067 sought to quiet title against Cross-Petitioners Lakin, Wilson, R.G.P. Inc., *et al.*, and Cross-Petitioner Iowa to the full 6390 acres comprising the Blackbird Bend Meander Lobe.[11]

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[9] *Ibid.*, 88-1426, p. 7. Throughout the Petition, Petitioner Tribe has referred to approximately 700 of land which are accretions to Tribe's trust lands. However in the June 29, 1987 Final Judgment and Decree title to approximately 306 acres, to which Hultman had denied Petitioner Tribe's title, was awarded to Cross-Petitioners Lakin, et. al., No. 88-1592, and 672.93 acres were awarded to Cross-Petitioner Iowa, No. 88-1636.

[10] *See*, Cross-Petition, No. 88-1592, p. 6; *see*, also Cross-Petition State of Iowa, No. 88-1636, p. 6-9.

[11] Pet. App., Appendix O, p. 269a, p. 272a.

PARCEL 2: Is comprised of the approximately 980 acres of land proved by Cross-Respondent Tribe to be accretions to Tribe's trust lands, title to which Evan L. Hultman, United States Attorney, in the complaint in *United States* v. *Wilson* denied Tribe's title to those lands, largely for the benefit of Mr. Hultman's former client, State of Iowa, but also for the benefit of Cross-Petitioners Lakin, Wilson, R.G.P., Inc., *et al.*,[12]

In the trial on the merits, Cross-Petitioner Lakin, Wilson, R.G.P. Inc. *et al.*, joined issue with Petitioner Tribe involving the full 6390 acres in Parcel 1, denied Cross-Respondent Tribe's title to that land and counterclaimed against Cross-Respondent Tribe in regard to their respective tracts of land within the 6390 acres.[13]

In the trial on the merits, Cross-Respondent Omaha Indian Tribe, having joined issue with the Cross-Petitioner Lakin, Wilson, and R.G.P., Inc. *et al.*, offered its proof of title in the district court to the full 6390 acres in PARCEL I, the Blackbird Bend Meander Lobe. There were no objections to Cross-

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[12] Pet. p. 7-11.

[13] Pet. App., Appendix CC, Answer and Counterclaim of R.G.P., Inc., P. 378a, 379a-380a, para. 8. *Note*: Allegations in CC, para. 8 are identical with those which were omitted in printing in BB, p. 376a-377a, Answer and Counterclaim of Wilson, *et al.*

Respondent Tribe's proof as to either its oral, documentary, or demonstrative evidence.[14]

Cross-Petitioners Lakin, Wilson, and R.G.P., Inc. *et al.*, likewise without any objections offered full proof of their respective claims to title to the 6390 acres devoting a vast preponderance of their evidence in their unsuccessful effort to prove that the Blackbird Bend Meander Lobe was comprised of accretions to the Iowa riparian bank.[15]

FINDINGS AND DECISION PERTAINED TO ENTIRE BLACKBIRD BEND AREA

It is most relevant here that the decision of the district court, Blackbird Bend I, pertained to the full 6390 acres.[16] Equally relevant is the fact that the Court of Appeals in OMAHA I referred to "the basic finding essential to the defendants' case is the trial court's statement" that the Barrett Survey land had been "washed away" and that "new land" was added to "Iowa riparian land" within the Blackbird Bend Area.[17] Moreover, the Court of Appeals in OMAHA I reversed that "basic finding" essential to

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[14] Pet., p. 9, *et seq.*, On p. 10 there is graphically displayed the area containing 6390 acres to which Cross-Respondent Tribe's evidence pertained.

[15] Ibid.

[16] Pet., p. 13-14; Pet. App., Appendix K, p. 205a, 245a, in which the district court found that the Blackbird Bend Meander Lobe and concluded: "V. The original Omaha Indian Reservation within the 1867 Barrett Survey has subsequently been washed away . . . and that at the same time new land was added to the Iowa riparian bank . . . within the Blackbird Bend Area . . . ."

[17] Pet., P. 13-14. Pet. App., Appendix I, *Omaha v. Wilson*, p. 135a, 167a.

Cross-Petitioner's claim to title declaring that the finding was "clearly erroneous and not supported by substantial evidence."[18] Additionally, and most relevant here, the Court of Appeals in OMAHA I, applying 25 U.S.C. 194, declared that the burden of proof resided with Cross-Petitioners to establish their counterclaims that the Blackbird Bend Meander Lobe had been washed away and was replaced by accretions to "the Iowa riparian land."[19] Based upon that decision in OMAHA I, the Court of Appeals declared that Cross-Respondent Tribe was entitled to judgment to only 1900 acres, not the 6390 acres claimed by Cross-Respondent Tribe in *Omaha* v. *Wilson*.

The Court granted Cross-Petitioners' request for review as to, among other things:

> Whether the Eight Circuit erroneously construed Title 25 U.S. Code 194 to make it applicable in this case.[20]

After a full review of the issue of the applicability of 25 U.S.C. 194, the Court declared that Cross-Petitioners Lakin, Wilson, and R.G.P., *et al.*, not only had the burden of proof but also the burden of persuasion and made this most relevant declaration as to the issues to which *Wilson* v. *Omaha* pertained:

> Petitioner [Cross-Petitioners here] argued that the river had gradually eroded the reservation lands on the west bank of the river, and *that the disputed land on the east bank,*

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[18] *Ibid.*

[19] Pet.App., Appendix I, p. 135a, 154a, 155a, 167a; *see*, Pet. p. 14.

[20] Pet. App., Appendix H, p. 107a, 113s, 118a, n.13.

> *in Iowa, had been formed by gradual accretion and belonged to the east-bank riparian owners.*[21]

It is manifest that the Court in *Wilson* v. *Omaha*, the district court in *Blackbird Bend I*[22] and the Court of Appeals in *OMAHA* I[23] did not limit their decisions to the Barrett Survey land, but rather rendered those decisions predicated upon the counterclaims of Cross-Petitioners who asserted in their pleadings and sought to prove that the Blackbird Bend Meander Lobe, and that part of the Meander Lobe within the Barrett Survey Line were accretions to the Iowa riparian bank. Most importantly here is that the Court in *Wilson* v. *Omaha* affirmed the decision of the Court of Appeals in *Omaha I* that the Cross-Petitioners had failed to sustain their burden of proving their "basic findings essential" to Cross Petitioners' claim to title that the lands in question were all accretions to the Iowa riparian land, affirming judgment in Cross-Respondent Tribe.

Of necessity, the opinions of the three Courts pertain to lands both *outside* and *within* the Barrett Survey Line, as graphically displayed in Plates I and II of Tribe's Petition.[24]

PARCEL II
BARRETT MEANDER LINE LAND

Contrary to fact, Cross-Petitioners Lakin, Wilson, and R.G.P., Inc., *et al.*, make this erroneous statement:

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[21] *Ibid.*, p. 115a. (Emphasis supplied).

[22] *Supra.* p. 2.

[23] *Supra.* p. 4.

[24] Pet., p. 7-11.

> The critical factual issue in the case was whether the Missouri River moved over an area, referred to as the Barrett Survey, in an avulsive or accretive manner at various times since 1854.[25]

Initially, as reviewed above respecting PARCEL I, the area involved in the litigation was not limited to the "Barrett Survey"; rather, the "Barrett Survey" was but a small part of the area litigated, all as graphically displayed by the decisions of the Appellate Court and the district court.[26] The River movement, either accretive or avulsive, did not and could not relate to the Barrett Meander Line which was a momentary high-water mark of the Missouri River in 1867. As stressed in the Petition, the Barrett Meander Line was not a boundary.[27] The boundary line is well stated by the Court in these terms:

> The eastern boundary of the reservation was fixed as the center of the main channel of the Missouri River, the thalweg.[28]

In 1867 the "center of the main channel of the Missouri River"—which was the boundary line between the State of Iowa and the Omaha Indian Reservation—was far removed from the transitory high-water line meandered by Barrett in 1867.

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[25] Cross-Petition, Wilson, Lakin, and R.G.P., Inc., p.3.

[26] *See*, OMAHA I, Plates I, II, III, and IV, Pet.App., Appendix I, p. 135a, 142a, 143a, 144a; *Blackbird Bend II*, Pet.App., Appendix F, p. 52a, 54a, 65a.

[27] Pet., p. 11.

[28] Pet. App., Appendix H, P. 107a, 114a.

There are additional grave errors in that statement. As reviewed above, the "factual issue in the case" is not how the Missouri River moved across the constricted "Barrett Survey"; rather the issue that was fully tried by all parties, and adjudicated by the courts, as reviewed above, is whether, as contended by the Cross-Petitioners, the Barrett Meander Line was comprised of accretions to the Iowa riparian land. It was determined by the Court of Appeals in OMAHA I that Cross-Petitioners had failed to sustain the burden placed upon them by 25 U.S.C. 194.

A critical element of Cross-Petitioners' error in declaring that the litigation was constricted to the "Barrett Survey" is the fact that the district court, having fully tried the issues respecting 6390 acres of which the Blackbird Bend Meander Lobe is comprised, could limit the judgment to the lands within the Barrett Meander Line predicated upon the pretrial order of April 5, 1976, which purported to limit the issues to the Barrett Meander Line.[29]

The Pre-Trial April 5, 1976 Sua Sponte Order Must Comport with the Evidence in the Case

Cross-Petitioners would have the Court ignore the fact that the entire trial on the merits pertained to the full 6390 acres of land comprising the Blackbird Bend Meander Lobe rather than in conformity with the 1976 pretrial *sua sponte* Order[30] that purported to limit the trial to the "Barrett Survey." The Cross-Petitioners, in seeking to limit the case to the lands within the "Barrett Survey," avoid reference to the

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[29] *See*, Pet. p. 9, *et seq.*; 12, *et seq.*

[30] Pet. App., Appendix GG, P. 403a, first para.

fact, as reviewed above, that they pleaded and undertook to prove that the entire Blackbird Bend Meander Lobe comprising 6390 acres was washed away and replaced by accretions to the Iowa riparian land. It is the *record* in the case—the oral, documentary, and demonstrative evidence—to which the April 5, 1976 *sua sponte* pretrial order must conform—not the converse, as urged by Cross-Petitioners.

Repeatedly the courts have declared, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, that where, as here, the evidence offered by all parties and received into the record without objection, the parties are bound by the issues actually tried irrespective of the pretrial order.[31] The precedents uniformly hold that where, as here, issues which were not stated in a pretrial order, but evidence was nevertheless offered without objection, the pretrial order is considered to have been amended to be in conformity with the proof offered in the trial on the merits.[32]

Moore has stressed that pretrial orders entered pursuant to Rule 16 of the Federal Rules of Civil Procedure should be read in light of Rule 15(b).[33] In addition, *Moore* reviews in detail an abundance of authority which holds that pretrial orders are to be

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[31] *Dean Foods Co. v. Albrecht Dairy Co.*, 396 F.2d 652 (CA 8, 1968).

[32] *Shelley v. Union Oil Co.* 203 F.2d 808 (CA 9, 1956); *see*, also *Vogrin v. Hedstrom*, 220 F.2d, 863 (CA 8, 1955) *cert.den.* 350 U.S. 845 (1955).

[33] Vol. 3, *Moore's Federal Practice* (Cumulative Supplement, 1988-89) "To Conform To Evidence R.15(b)," Sec. 15-13[1]. p. 15-119, *et seq.*

amended to conform with the evidence received into the record either by express agreement or implied approval based upon failure to object. In the Court's decision of *Brandon et al.*, v. *Holt*[34] there is reviewed in comprehensive detail the principle that the proof in the record is controlling over pleadings and pretrial orders.

The concepts enunciated above must surely have application to the *sua sponte* pretrial order which was totally ignored at the trial on the merits and which must be set aside to comport with the pleadings and proof in the record offered by all parties, Petitioner Tribe and Respondents alike, which proof related to the entire Blackbird Meander Lobe, and not to the constricted "Barrett Survey," as argued by Cross-Petitioners. The Court, in the *Brandon* decision, cites Rules 15(b) and the authorities which have applied that Rule which was designed " 'to avoid the tyranny of formalism.' " It has been authoritatively stated that the procedures provided for Rule 15(b).

> . . . are intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel or on the basis of a statement of the claim or defense that was made at a preliminary point in the action [the *sua sponte* order] and later proved to be erroneous.[35]

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[34] 469 U.S. 464, 471 (1985).

[35] Vol. 6, *Federal Practice and Procedure*, Sec. 1491, p. 45.

Cross-Petitioners Place in Issue Title to "Fee Patented" Lands Denied to Tribe by Evan L. Hultman, United States Attorney[36]

Cross-Petitioners Lakin, Wilson, R.G.P., Inc., *et al.*, refer to their claim of title "to approximately 300 acres of fee patent land."[37] By that claim to title to the "fee patent land," there is placed in issue whether Cross-Respondent Tribe can be bound by the "forced fraudulent" representation by Evan L. Hultman who, as United States Attorney, forced his representation upon the Tribe and denied Tribe's title in *United States* v. *Wilson* to the "fee patent land."[38]

As part of Cross-Respondent Tribe's case in chief, which was directed primarily to Tribe's claim to the 6390 acres in the Blackbird Ben Meander Lobe, proof was offered to establish that the "fee patent lands," concerning which Evan L. Hultman denied Tribe's title, had been totally obliterated and completely replaced by accretions to Tribe's trust land.[39] In *Blackbird Bend II*[40] the district court found as a fact that:

> Individual defendants, [Cross-Petitioners here] as well as the State of Iowa, claimed title to the 'fee patented' lands .... The Tribe, however, proved defendants never possessed the actual land described in the fee patents because the river obliterated and

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[36] Pet., p. 7, *et seq.*

[37] Cross-Petition, p. 6, second paragraph.

[38] Pet., p. 7-11.

[39] Pet., P. 14-15.

[40] Pet.App., Appendix F, p. 52a, 80a.

> eroded the fee lands prior to defendants entry thereupon.[41]

Predicated upon those facts and contrary to the claim to the "fee patented" land, the district court rejected the claims of Cross-Petitioners making the following statement:

> This Court finds and concludes, however, the Tribe established by a preponderance of the evidence that the river eroded the lands in the western Barrett Survey area, including those described in the fee patents, and replaced those lands with accretions and relictions to trust lands . . . .[42]

title to which resides in Cross-Respondent Tribe.

It is most relevant here, on the background of Cross-Petitioners attack upon the Constitutionality of 25 U.S.C. 194, that the district court, on the subject of 25 U.S. 194, declared:

> Even if 25 U.S.C. § 194 did not apply and the Tribe had the burden of proof, this Court holds the Tribe established by a clear preponderance of the evidence its right and claim to the land occupying the area described in the fee patents.[43]

From that express ruling by the district court, awarding to Cross-Respondent Tribe title to the accretions to the trust lands, which had replaced the "fee patent" lands, Cross-Petitioners appeals and that

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[41] *Ibid.*

[42] *Ibid.*, p. 80a.

[43] *Ibid.*, n. 19.

appeal gave rise to OMAHA III divesting Cross-Respondent Tribe of its title to those lands.[44]

Court of Appeals Effectively Abrogated the Court's *Wilson v. Omaha* Decision

The Court of Appeals in OMAHA III acknowledges the district court's findings and conclusions that ". . . the fee-patented land was completely washed away by the post-1923 western movement of the river" and reemphasized that fact by stating "it is undisputed that" the "fee patented lands" claimed by Cross-Petitioners Lakin, et al., are accretions to Cross-Respondent Tribe's trust lands but declared, nevertheless—relying on *Wilson* v. *Omaha*—it is believed in total error, that:

> We deem this fact not significant. It is the *area* of land now occupied by the landowners that is important. *See, Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 668 . . . .[45]

The magnitude of the conflict between the Court of Appeals' OMAHA III decision and *Wilson* v. *Omaha* is clearly defined by these quoted excerpts from the Court's decision:

> . . . § 194 operates regardless of the circumstances once the Tribe or its champion, the United States, has demonstrated that the Tribe was once in possession of or had title to the area under dispute . . . .
>
> Section 194 is triggered once the Tribe makes out a prima facie case of prior pos-

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[44] Pet., p. 15, *et seq.*

[45] Pet.App, Appendix G, p. 93a, 99a-103a. (Court's emphasis).

> session or title to the particular area under dispute.[46]

By its opinion, the Court of Appeals has effectively abrogated the Court's opinion in *Wilson* v. *Omaha*. To interpret *Wilson* v. *Omaha* as awarding title to "the landowners" who are occupying the land at the time of the trial is clear violation of the Court's opinion. It is manifest that the Court of Appeals had great difficulty in rationalizing away Tribe's title to the accretions to Tribe's trust lands. To justify its denial of Tribe's proven title to the accretions to the trust lands, the Court of Appeals, in error, declared that the only means pursuant to which title to those lands could be acquired by the Tribe was by an avulsion across the Barrett Survey land.[47]

It is incredible that the Court of Appeals should thus construe 25 U.S.C. 194 as denigrating the quality of Cross-Respondent Tribe's title to the trust lands by denying Tribe the right to accretions to those trust lands. Accretions are an invaluable property right, one of the natural attributes of title. In Horn-Book Theory, the Court of Appeals, in grave error, has denied that the Tribe has title to one of the sticks in the bundle of rights constituting fee simple title.

In denying Tribe the accretions which are part and parcel of the trust lands and recognizing title in Cross-Petitioners to the nonexistent fee patent lands, the Court of Appeals violated the most elemental principles of real property law recognized, enunciated, and applied by the district court in these terms:

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[46] Pet.App., Appendix H, p. 107a, 122a-123a.

[47] Pet. App., Appendix G, p. 92a, 102a.

> In both Nebraska and Iowa, the effect of such a movement of the river is to destroy the title to the land obliterated by the movement of the river. *State* v. *Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977); *Winkle* v. *Miters*, 195 Neb. 821, 241 N.W.2d 329 (1976); *Rupp* v. *Kirk*, 231 Iowa 1387, 4 N.W.2d 264 (1942); *Wilcox* v. *Pinney*, 250 Iowa 1378, 98 N.W.2d 720 (1959). This court cannot, therefore, apply state laws of adverse possession or laches based upon the former title to the lands in fee patent. Application of those laws if at all, must be based upon the present character of the title to the accretions.[48]

THE PRINCIPLES OF *RES JUDICATA* FORECLOSE RECONSIDERTION OF THE VALIDITY OF 25 U.S.C. 194

A full decade ago the Court in *Wilson* v. *Omaha* declared in specific terms the principles sustaining the Constitutionality of 25 U.S.C. 194 which the Court stated was within the purview of the Congressional authority to enact legislation to protect the rights and interests of Cross-Respondent Omaha Indian Tribe. On the subject the Court declared:

> Because of recurring trespass upon and illegal occupancy of Indian territory a major purpose of these Acts as they developed was to protect the rights of Indians to their properties. Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions.

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[48] Pet.App., Appendix F, p. 52a., 81a.

The Court reemphasized the protection of Indian Tribes against non-Indian squatters by declaring that:

> "It is clear enough that, when enacted, Congress intended the 1822 and 1834 provisions to protect Indians from claims made by non-Indian squatters on their lands.[49]

In applying 25 U.S.C. 194, it is evident that the Court was seeking to rectify the failure of the Trustee over a long period of time from acting on behalf of the Tribe against the squatters. In its injunctive order of June 5, 1975, the district court took cognizance of the fact that, although the Tribe had been forced out of possession for a great many years, the Tribe had never abandoned its claim to the land. On the subject, the district court declared:

> The record reflects that members of the Tribe have never totally acquiesced in defendants' use of the land and the Monona County Assessor apparently felt unsure enough of the status of title to omit these lands from the tax rolls for many years. Perhaps the true uncontested status was many years ago before the Missouri River changed its course.[50]

Moreover, when the district court denied the efforts of the Department of Justice to seize and take from the Tribe its "profits" from the farming operation, the district court rejected that effort, declaring:

> The Tribe will not be penalized for the government's failure for approximately 50 years

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[49] Pet.App., Appendix H, p. 107a, 119a-120a.

[50] Pet.App., Appendix M, p. 256a, 260a.

> to promptly seek quiet title to the trust lands.[51]

Reference is warranted to the fact that the Court of Appeals in OMAHA IV—irrespective of the abundance of sound precedents to the contrary—permitted the Department of Justice to seize and take the Tribe's profits from its farming operations.[52]

That harsh and unreasonable decision of the Court of Appeals is a critical issue in Tribe's petition for a writ of certiorari.

The Court in *Wilson v. Omaha* affirmed that application of 25 U.S.C. 194,[53] as declared by the Court of Appeals in OMAHA I, in which that court denied Cross-Petitioners' title on the basis that they had failed to sustain their burden of proof that the lands which they are occupying are accretions to the Iowa riparian land.[54]

Predicated upon the Court's determination that 25 U.S.C. 194 placed the burden upon Cross-Petitioners to prove their title, Cross-Petitioners—having failed to sustain that burden of proof—are now precluded by the concept of *res judicata* to retry that issue. It is of great importance as reviewed above, that the record in the case—the oral, documentary, and demonstrative evidence offered by all parties, Cross-Respondent and Cross-Petitioner alike—pertained to the 6390 acres and that litigation should not be retried, as ordered by the Court of Appeals. Those prin-

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[51] Pet.App., Appendix B, p. 16a, 35a.

[52] Pet.App., Appendix C, p. 37a, 44a.

[53] Pet.App., Appendix H, p. 107a, 116a-119a.

[54] Pet.App., Appendix I, p. 135a, 167a.

ciples of *res judicata* respecting the title to the full 6390 acres are applicable irrespective of the fact that the April 15, 1976 pretrial *sua sponte* order purported to constrict the issues to the "Barrett Survey."[55]

CONGRESS EXERCISED ITS CONSTITUTIONAL AUTHORITY RESPECTING INDIAN AFFAIRS

Congress was well within its Constitutional authority when it enacted 25 U.S.C. 194. Cross-Petitioners failed to cite a single authority that would place in question the Constitutionality of 25 U.S.C. 194.

It is essential at the outset clearly to establish that when Congress enacted 25 U.S.C. 194 it was exercising a specific Constitutional authority which, among other things, declared that:

> Congress shall have power. . . .; To regulate commerce with foreign nations and among the several states and with the Indian Tribes.[56]

In the exhaustive review of Congressional power over Indian Affairs and the legal consequences flowing from Cross-Respondent's Treaty of 1854, the Court made this statement:

> The source of federal authority over Indian matters has been the subject of some confusion, but is now generally recognized that the power derives from federal responsibility

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[55] *Supra.*, p. 12, *et seq.; see* Pet. p. 23, *et seq.*, for principles of *res judicata.*

[56] Constitution of the United States, Article I, Section 8, Clause 3.

> for regulating commerce with Indian tribes and for treaty making. *See*, Const. Art. I, s8, Cl.3; Art. II, § 2, cl.2.[57]

Numerous decisions applying the Constitutional concepts that Congress has plenary power and control of Indian Affairs to preserve and protect Indian rights, titles, and interests of the character here involved support Cross-Respondent Tribe in asserting that 25 U.S.C. 194 is a valid exercise of Congressional authority when Indian Tribes are confronted, as here, with powerful political, non-Indian claimants.[58]

The Court's Opinion in *Wilson v. Omaha* enunciated the basic precepts of the law respecting statutory interpretations which are governing here:

> ". . . 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 80 (1918)."[59]

As Trustee for the Omaha Indian Tribe, the United States has the unique power, authority, and obligation

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[57] *McClanaham v. Arizona State Tax Commission*, 411 U.S. 164, 172, n.7 (1973).

[58] *Bryan v. Itasca County*, 426 U.S. 373, 376, n.2 (1976); *Arizona v. California*, 373 U.S. 564, 599-601 (1963); *Winters v. United States*, 207 U.S. 564, 576-577 (1908); *Morton v. Mancari*, 417 U.S. 535, 551-553 (1974).

[59] Pet.App.., Appendix H, p. 107a, p. 120a.

to preserve and protect the rights and interest of American Indian Nations, Tribes, and People.[60]

On the background of those broad Constitutional powers and the obligation of the Trustee United States, reference is made to the gravamen of the Tribe's Petition for Certiorari which establishes beyond controversy that agents of the United States Trustee "sold out" the interests of the Tribe and did so while acting in concert with the Cross-Petitioners.[61]

Hypocrisy Is the Hallmark of the Cross-Petition

Cross Petitioners have the termerity to assert that:

> The Indian plaintiffs have been able to enlist the vast resources of the United States, Department of Justice. . . . The United States, in fact, is the original plaintiff and brought suit on behalf of the Tribe.[62]

The case of *United States v. Wilson* prepared and filed by attorneys in the Justice Department, over the unvarying protests of Cross-Respondent Tribe, had as its objective from the moment of its inception the constriction of the Tribe's claims to 6390 acres within the Blackbird Bend Meander Lobe to 1900 acres within the Barrett Meander line. The attorneys in the Department of Justice knew that the Blackbird Bend Meander Lobe was a unitary tract of land which could only properly be tried as a single unit. Rather than claiming the full 6390 acres, those attorneys (a) denied petitioner Tribe's claim to several hundred acres

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[60] *Seminole Nation v. United States*, 316 U.S. 286, 297 (1944); *Shoshone Tribe v. United States*, 299 U.S. 476, 497-498 (1967).

[61] Pet., p. 7-11.

[62] Cross-Petition, p. 17.

of land—980 acres—; (b) intentionally abandoned valid claims to 3400 acres of land outside of the illusory Barrett Meander Line; and (c) constricted the Tribe's claim to 1900 acres as distinguished from the valid claim of 6390 acres made by the Tribe on its own behalf in *Omaha v. Wilson.*[63]

The constricted complaint prepared and filed by the Myles E. Flint, attorney, and Evan L. Hultman, United States Attorney, Department of Justice, is a classic example of the agents of the Trustee rather than utilizing those "vast resources of the United States"[64] for the benefit of the Tribe, instead fraudulently connived with the Cross-Petitioners to defeat the Tribe and have intentionally "sold out" the Tribe's interests for the benefit of Cross-Petitioners, who have the audacity to seek equity in the courts.[65]

It is undenied and undeniable that attorneys for the Cross-Petitioners communicated directly with and exchanged information with Myles E. Flint and other attorneys in the Department of Justice and attorneys in the Department of the Interior antecedent to the formulation and filing of the fraudulent complaint in *United States v. Wilson.*[66]

It is charged here that Thomas R. Burke, Counsel for Cross-Petitioner Wilson, *et al.*, communicated directly with both the attorneys in the Departments of Justice and Interior and was unquestionably instru-

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[63] Pet., p. i, first question; p. 6-11.

[64] Cross-Petition, p. 17.

[65] Pet. P. i, first question; p.. 6-11; p. 18 *et seq.*

[66] Pet., p. 6, *et seq.*; Pet. App., Appendix W, p. 337a, 351a, 352a, *et seq.*

mental in the formulation and filing of the corrupt complaint in *United States v. Wilson.*[67]

Magnitude of Cross-Petitioners' attempt to dissemble and pervert the facts, and to ascribe to 25 U.S.C. 194 their hypocritical assertions that Cross-Petitioners have been victimized in this statement:

> The application of 25 U.S.C. s 194 has produced in this case precisely the kind of irrational result which might be expected when a case is decided on the basis of who the litigants are rather than upon the truth of their claims.[68]

It is then declared that:

> (a) Iowa will retain ownership of its land because of Section 194 does not apply to it;
>
> (b) Cross-Petitioners will retain the fee patent land because Section 194 does not apply within this 'area';
>
> (c) Cross-Petitioners will lose the rest of the land because they are 'white persons' and Section 194 applies to them.[69]

Short shrift may be made of the sophistry in which Cross-Petitioners have engaged in the above-quoted excerpts:

(a) Cross-Petitioner Iowa has title to land within the Blackbird Bend Area by reason of the fact that Evan L. Hultman, as United States Attorney, in filing

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[67] *Ibid.*

[68] Cross-Petition, p. 17.

[69] *Ibid.*, p. 17-18.

the constricted, fraudulent complaint in *United States v. Wilson* denied Tribe's title to the precise lands which Mr. Hultman, as Attorney General, had obtained for Cross-Petitioner Iowa in earlier litigation. Those lands were, moreover, proven by Cross-Respondent Tribe to be accretions to Tribe's trust lands, Tribe having established its title by a clear preponderance of the evidence without the aid of 25 U.S.C. 194.[70] It was Evan L. Hultman's fraud—not 25 U.S.C. 194—that vested title in Cross-Petitioner Iowa.

(b) Cross-Petitioners declare that they retain title to the "fee patent land" because Section 194 does not have application to the [fee patent] "area." The "fee patent land" awarded to Cross-Petitioners is directly attributable the fraudulent denial by Evan L. Hultman of Cross-Respondent Tribe's title in the complaint in *United States v. Wilson*. Once again, 25 U.S.C. 194 was not remotely involved.[71] Additionally the Tribe, in its Petition, seeks to have reviewed the clearly erroneous determination by the Court of Appeals that Cross-Petitioners are entitled to those lands because they are now occupying them. That clear violation of the Court's opinion in *Wilson v. Omaha* is a critical issue concerning which Cross-Respondent Tribe seeks review, all as set forth in its Petition.[72]

(c) Finally Cross-Petitioners, continuing the facetious assault on 25 U.S.C. 194, assert that they will lose "the rest of the land" because they are "white

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[70] Pet. p. 14-15.

[71] *Ibid.*

[72] *Ibid.*, p. 15 *et seq.*

persons." Cross-Petitioners refuse to acknowledge that the Court of Appeals in OMAHA I declared that, after Cross-Petitioners had a full and fair opportunity to prove their title based upon the alleged accretions to the Iowa riparian land, they failed totally in their efforts.[73] The failure of Cross-Petitioners was that they were unable to overcome the actual physical fact that the Blackbird Bend Meander Lobe is not and never was an accretion to the Iowa riparian land. Rather it was a single unitary tract of land which had been severed from the Tribe's Reservation by avulsions away from the 1875 and 1912 abandoned channels of the Missouri River, and most assuredly not by reason of 25 U.S.C. 194.

Cross-Respondent Tribe rejects out of hand Cross-Petitioners' assertion that the expert witnesses on "both sides" were forced to engage in "educated guesses."[74] It is unquestionably true that Cross-Petitioners' expert, Dr. Hallberg, admitted on cross-examination, that his expert opinions were "educated guesses."[75] Most assuredly Cross-Respondent Tribe's witnesses did not, nor was it necessary for them to engage in "educated guesses." In that regard reference is made to the fact that all of the Plates extensively utilized by both the district court and the Appellate Court were copies of Tribe's exhibits, admitted into evidence at the trial on the merits based upon the testimony of Tribe's well-qualified experts.[76]

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[73] Pet. p. 9, *et seq.*; p. 23 *et seq.*

[74] Cross-Petition, p. 11, n. 14.

[75] Cross-Petition, p. 11, n. 14.

[76] Pet.App., Appendix I, OMAHA I, p. 135a, 142a-144a; Appendix F, *Blackbird Bend II*, p.. 52a, 58a-65a.

CONCLUSION

Cross-Respondent Omaha Indian Tribe refers to the question set forth initially in this brief in opposition in which the issue is presented as to whether Cross-Petitioners Lakin, Wilson, R.G.P., Inc., *et al.*,—having been active participants in and beneficiaries of the fraud practiced upon the Tribe—are entitled to be heard in regard to their misinterpretation of 25 U.S.C. 194, prior to having resolved the issue of forced, fraudulent representation of the Tribe which permeates all aspects and phases of these proceedings.

Respectfully submitted,

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Nos. 88-1426, 88-1592 and 88-1636

In the Supreme Court of the United States

OCTOBER TERM, 1988

OMAHA INDIAN TRIBE, ET AL., PETITIONERS

v.

HAROLD JACKSON ET AL.

JOHN R. WILSON, ET AL., CROSS-PETITIONERS

v.

OMAHA INDIAN TRIBE, ET AL.

STATE OF IOWA, ET AL., CROSS-PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITION AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether two named counsel for the United States engaged in "forced, fraudulent representation" of the Tribe's interests in this litigation.

2. Whether the instant litigation should have adjudicated those parts of the Tribe's claims that have been severed for future consideration.

3. Whether the district court violated Fed. R. Civ. P. 52(a) when it concluded that it was unnecessary, on the third remand of this complex litigation, to reiterate the factual findings set forth in earlier opinions.

4. Whether the burden-of-proof provisions of 25 U.S.C. 194 were correctly applied to the facts of this case.

5. Whether the escrowed net profits from the farming operations on the lands at issue were available to defray the payments to the defendants for the improvements they had made to those lands, as to which title has been quieted in the United States for the beneficial interest of the Tribe.

6. Whether the burden-of-proof provisions of 25 U.S.C. 194 subject the petitioners in No. 88-1592 to invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment of the Constitution.

7. Whether a decision to apply 25 U.S.C. 194 to the claims of the State of Iowa would deprive that State of its constitutional rights.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1426

OMAHA INDIAN TRIBE, ET AL., PETITIONERS

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UNITED STATES, ET AL.

ON PETITION AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The latest opinion of the court of appeals (Pet. App. 37a-48a)[1] is reported at 854 F.2d 1089. The latest opinion of the district court (Pet. App. 5a-15a) is reported at 578

[1] "Pet. App." refers to the Appendix to the petition in No. 88-1426.

F. Supp. 1191. The final judgment of the district court (Pet. App. 16a-30a) is unreported; the modification thereof (Pet. App. 31a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1988, and a petition for rehearing was denied on November 10, 1988 (Pet. App. 49a). Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including February 28, 1989. The petition, No. 88-1426, was filed on that date and received by both cross-petitioners on March 3, 1989 (88-1592 Pet. 2; 88-1636 Pet. 3). Pursuant to Sup. Ct. R. 19.5, the cross-petition in No. 88-1592 was filed on March 30, 1989, and the cross-petition in No. 88-1636 was filed on Monday, April 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This litigation is a dispute over title to land within the original boundaries of the Omaha Indian Reservation created by treaty in 1854 along the west bank of the Missouri River in what was then Nebraska Territory. The River has changed course numerous times since 1854. In 1867, when the portion of the Reservation boundary at issue was surveyed by T. H. Barrett (the Barrett Survey), the River made a sharp oxbow curve creating a peninsula attached to the west or Nebraska side of the River.[2] The approximately 2,900-acre peninsula, which has since been cut off from the Nebraska side by the River and now lies

[2] The district court described the oxbow early in this litigation as "a meander lobe or peninsula sticking out like a thumb pointing east from Nebraska into Iowa" (Pet. App. 207a). Maps of the area at various times appear at Pet. App. 58a-65a.

on the eastern or Iowa side, is referred to in this litigation as the Barrett Survey Area.

In 1975, the United States brought suit as trustee for the Omaha Tribe to quiet the government's title to the lands within the Barrett Survey Area, with the exception of about 400 acres that had been allotted to individual Indians and subsequently sold to non-Indians (the fee-patented lands). Pet. App. 95a, 100a, 263a.[3] The Tribe subsequently filed two suits in its own right, claiming title not only to the fee-patented lands, but also to a larger 6,390-acre area known as Blackbird Bend, which encompasses the Barrett Survey Area, and to about 5,000 acres within two additional bends upstream (Pet. App. 253a, 269a). The three suits were consolidated and the Tribe's claims to lands outside the Barrett Survey Area and for damages were severed. The district court entered judgment against the Tribe and the United States in 1977 with respect to the common claims for the Barrett Survey Area (Pet. App. 252a). The court of appeals reversed (Pet. App. 135a), and this litigation came before this Court for the first time in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979); the Court there vacated the court of appeals' judgment and remanded the case for further proceedings. Over the last decade, the subsequent proceedings in both courts below have again culminated in a final judgment, which the Tribe[4] now asks this Court to review.

The fundamental factual issue in this litigation is whether the Missouri River moved by avulsion or by ero-

[3] In preparing answers to interrogatories, the United States discovered an additional 300 acres that had been allotted and sold.

[4] For the sake of simplicity, petitioners in No. 88-1426 will be referred to as the Tribe, conditional cross-petitioners in No. 88-1592 will be referred to as individual defendants, and conditional cross-petitioners in No. 88-1636 will be referred to as the State.

sion and accretion subsequent to the Barrett Survey.[5] The Tribe's claims of title rest on the contention that the river moved by avulsion prior to 1923, and thereafter by erosion and accretion along the western edge of the survey area. The fundamental legal issue involves the interpretation and the scope of 25 U.S.C. 194.[6] This Court in *Wilson* concluded that Section 194 applies to disputes with Indian tribes, and that it shifts the burden of persuasion, as well as the burden of coming forward with evidence, to the non-Indian party once the Indian party establishes a prima facie case, but that Section 194 does not apply to a State. 442 U.S. at 664-669.[7]

Applying the interpretation of Section 194 adopted by this Court in *Wilson*, the court of appeals on remand ordered title to approximately 1,900 of the 2,900 acres in the Barrett Survey Area quieted in the United States on

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[5] As the Court explained in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 660 n.7 (citations omitted):

> Simply stated, when a river which forms a boundary between two parcels of land moves by processes of erosion and accretion, the boundary follows the movements of the river. On the other hand, when a river which forms a boundary between two parcels of land abruptly moves from its old channel to a new channel through an event known as avulsion, the boundary remains defined by the old river channel.

[6] That Section provides that:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

[7] The Court also concluded that, although federal law governs the definition of what types of river movement constitute avulsion rather than erosion, state law should be adopted as the federal rule of decision. 442 U.S. at 671-676.

behalf of the Tribe; it remanded to the district court for further proceedings with respect to the fee-patented lands and certain lands in the western part of the Barrett Survey Area claimed by the State of Iowa. *Omaha Indian Tribe* v. *Wilson*, 614 F.2d 1153 (8th Cir.), cert. denied, 449 U.S. 825 (1980). On remand, the district court found that the Tribe had proved by a clear preponderance of the evidence that neither the State nor the individual defendants had a valid claim to the disputed land, and quieted the title to the entire Barrett Survey Area in the United States as trustee for the Tribe. *United States* v. *Wilson*, 523 F. Supp. 874 (N.D. Iowa 1981) (Pet. App. 76a-84a).[5] The district court also denied the individual defendants' counterclaim for the value of their improvements to the lands, holding that the sovereign immunity of the United States barred the counterclaim (Pet. App. 84a-89a).

On appeal, the court of appeals reversed, holding that the district court had improperly given the Tribe the benefit of 25 U.S.C. 194 in adjudicating the claims to the lands held by the State and to the fee-patented lands. *United States* v. *Wilson*, 707 F.2d 304 (8th Cir. 1982), certs. denied, 465 U.S. 1025 and 1101 (1984) (Pet. App. 94a-103a). The court of appeals also ruled that the United States could be held liable for the value of improvements, holding that the equitable duty to pay for the improvements "is an element of the government's own claim, a condition precedent to the right of the United States to recover" and that the doctrine of sovereign immunity was therefore "inapplicable" (Pet. App. 106a). This Court

[5] The district court concluded that the court of appeals' opinion established the Tribe's ownership of all the Barrett Survey Area land (including the fee-patented lands) except that claimed by the State along the western edge of the area, and since the river had moved by accretion, not avulsion, the Tribe owned that land as well. Pet. App. 74a-77a & n.15.

denied the United States' petition for certiorari on that issue, 465 U.S. 1025 (1984).

Once again on remand, the district court issued its most recent opinion, holding that, without benefit of the Section 194 presumption, the Tribe had failed to prove that the river movements between 1879 and 1923 were avulsive and thus had failed to prove its claims to either the fee-patented lands or to the land held by the State, and that the individual and state defendants had met their burden of proving that title to these lands should be quieted in them. *United States* v. *Wilson*, 578 F. Supp. 1191 (N.D. Iowa 1984) (Pet. App. 8a-15a). The final judgment, dated May 29, 1987 (Pet. App. 16a-30a), quieted title to the 1,900 acres of the eastern Barrett Survey Area in the United States in trust for the Tribe and quieted title in the remaining 1,000 acres of fee-patented land and land held by Iowa in the individual defendants and the State, respectively. The judgment also obligated the United States to pay the individual defendants for the stipulated value of the improvements, totalling more than $1.9 million plus prejudgment interest (Pet. App 22a), and permitted the United States to use the escrow fund held in the registry of the district court "to partially satisfy its obligation to pay for improvements" (Pet. App. 30a).[9] On the Tribe's motion, the district court subsequently amended its order and denied the United States the right of reimbursement from the escrow fund (Pet. App. 33a-36a).

[9] The escrow fund had been created pursuant to the district court's order of June 5, 1975, the preliminary injunction which put the Tribe in possession of the lands. In order to reduce the "probability of financial injury to the defendants," the court required the Tribe to deposit the net profits from the 1975 farming operations on these lands with the clerk of court pending final disposition of this quiet title action (Pet. App. 259a, 262a). The profits from subsequent years were also deposited (Pet. App. 34a-35a).

In the latest round of appeals, the Eighth Circuit affirmed the judgment quieting title to the remaining 1,000 acres in the Barrett Survey Area in Iowa and the individual defendants, rejecting the Tribe's claims that the district court erred first, in finding that the Tribe had not met its burden of proof and second, in failing to set forth its factual findings in sufficient detail (Pet. App. 40a-44a). The court of appeals upheld the government's claim on its appeal that the district court should have allowed the profits from the escrow fund to be used to pay for the improvements (Pet. App. 44a-45a), but it rejected the government's challenge to the award of prejudgment interest on the value of the improvements, holding that the award of interest was no more a breach of the government's sovereign immunity than the equitable requirement that the United States pay for the improvements (Pet. App. 45a-47a). Finally, the court of appeals rejected the argument of the individual defendants that, because 25 U.S.C. 194 placed the burden of proof upon them as white citizens, it amounted to invidious racial discrimination and violated Fifth Amendment due process (Pet. App. 47a).

ARGUMENT

1. None of the questions presented in the petition for certiorari in No. 88-1426 merits review by this Court. On these questions, the decision of the court of appeals is correct and does not conflict with any decision of this Court (including the earlier decision in *Wilson* v. *Omaha Indian Tribe, supra*), or of any other court of appeals.

a. Petitioner Tribe alleges that two named counsel for the United States engaged in "forced, fraudulent representation" of the Tribe's real interests in this litigation, and, as a result, the government's claims on behalf of the Tribe

were "intentionally constricted" (88-1426 Pet. 4-5, 18-22). The United States has responded to these charges in both the district court and the court of appeals, demonstrating that the government's filing of the complaint that initated this action was properly authorized in accordance with established procedures. See, *e.g.*, Pet. App. 329a-336a, 450a-460a. The district court found that the Tribe's contentions of impropriety were entirely without factual or legal basis. Indeed, after concluding that the Tribe's motion for summary judgment based on those contentions was "so flawed that no reasonable person could maintain that it is either factually well grounded or legally warranted", the court awarded sanctions against petitioner Tribe's counsel under Fed. R. Civ. P. 11 for frivolous pleadings (Pet. App. 365a-366a).[10] The court of appeals subsequently denied the Tribe's petition for relief based on these allegations as "frivolous and totally without merit"; that court also awarded sanctions against the Tribe's counsel for filing "a totally frivolous pleading" (*id.* at 461a). In the latest appeal, the Eighth Circuit refused to "entertain this meritless issue" again (*id.* at 40a n.4).

It is entirely clear that this issue does not warrant this Court's attention. The Tribe—represented by counsel of its choice—has participated fully in litigating title to the lands within the Barrett Survey Area, and nothing in the present judgment prevents the Tribe from pursuing its remaining claims to the larger area outside the Barrett survey.[11]

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[10] The same counsel continues to represent the Tribe in this Court.

[11] In the previously severed portion of the suit (see p. 3, *supra*), the district court found on March 24, 1989, that the Tribe and its counsel have not complied with several earlier orders in the instant portion of the suit—including orders requiring the payment to the individual defendants, the State, and the United States of specified costs as sanc-

b. Petitioner Tribe also appears to argue that the judgment below should have encompassed all the lands claimed by the Tribe, including those located outside the Barrett Survey Area (88-1426 Pet. 23-26). However, as the court of appeals correctly noted (Pet. App. 44a n.5), the scope of the present litigation was long ago limited to settling title to the lands within the Barrett Survey Area, leaving the Tribe's larger claims for later adjudication. See *Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 660. The Tribe's remaining claims are yet to be litigated. The effect, if any, of the present judgment upon those claims remains for consideration in the context of that litigation (cf. Pet. App. 48a), and is accordingly not ripe for determination by this Court.

c. Petitioner Tribe also contends that the court of appeals failed to enforce the requirement of Fed. R. Civ. P. 52(a) that a district court must adequately set forth its findings (88-1426 Pet. 25-26). The district court's final opinion declared that "[n]othing is gained by recataloguing the evidence here" (Pet. App. 8a). The court of appeals stated that the adequacy of the findings "must be viewed against the extensive prior scrutiny of the evidence in this case not only by the district court on two occasions, but also by this court on three separate occasions and by the United States Supreme Court" (*id.* at 43a). The court of

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tions for frivolous filings, and orders imposing fines for contemptuous conduct. On the basis of these findings, the district court entered an order dismissing the Tribe's remaining claims with prejudice "unless the Tribe and Mr. Veeder fully comply with all orders as set forth herein, or show cause why they should not be required to do so by not later than April 10, 1989." Dist. Ct. Order 11. Petitioner Tribe's counsel submitted a check to the district court in payment of the amounts assessed, and asked the court to escrow the funds in its registry pending this Court's action on the instant petition for certiorari. On April 24, 1989, the district court denied the escrow request and directed the clerk to distribute the funds to the parties entitled to them under its previous orders.

appeals found (*id.* at 43a-44a) that the district court's reference to the prior decisions in this case "for a full statement of the extensive evidence" was sufficient to satisfy Rule 52(a). Nothing in this entirely routine conclusion warrants this Court's attention.

d. Petitioner Tribe challenges the application of 25 U.S.C. 194 to the factual context established in this litigation (88-1426 Pet. 25-26). The judgment below quiets the Tribe's beneficial title to all the trust lands which were in the possession of the individual, non-Indian defendants, while quieting title in those defendants only to those fee-patented lands to which the court found they held record title. The State, to which 25 U.S.C. 194 does not apply, prevailed in quieting its title to the lands for which the court found it held record title. See Pet. App. 12a-14a. There is no inconsistency on this record with this Court's decision in *Wilson* v. *Omaha Indian Tribe*, *supra*. In any event, this highly fact-specific claim does not warrant further review by this Court.

e. Finally, petitioner Tribe urges (88-1426 Pet. 26-28) that the court of appeals erred in permitting the funds escrowed in the district court registry to be used to defray part of the cost of improvements which the United States is obliged to pay under the judgment. The Tribe does not question that the individual defendants who occupied trust land are entitled to recover the value of the improvements from the United States. With that premise accepted,[12] the

[12] Earlier in this litigation, the United States petitioned this Court for review of the court of appeals' holding (Pet. App. 106a) that the government could be held liable to pay for the value of the improvements, urging that sovereign immunity barred any such claim in a quiet title action in which the government sought only title, not damages or mesne profits. The petition was denied, 465 U.S. 1025 (1984). In the latest appeal, the Eighth Circuit used the same reasoning to hold the government liable to pay prejudgment interest on the value

holding of the court of appeals is clearly correct and consistent with the general trust law that a trustee is ordinarily entitled to reimbursement from the trust estate for expenses incurred for the benefit of the trust beneficiary (see Pet. App. 44a-45a). In this case, as the court of appeals found (*id.* at 45a), the Tribe "has obtained the substantial benefit of having the land within the Barrett Survey cleared, drained, and otherwise improved through the efforts of the non-Indian defendants." Title to the improved lands has been quieted to the Tribe's beneficial interest. Accordingly, the judgment properly allows the escrow fund to be used to reimburse the United States for its payment of the value of those improvements.[13]

2. Conditional cross-petitioners in No. 88-1592 and No. 88-1636 challenge the constitutionality of 25 U.S.C. 194. Because these petitions would be jurisdictionally out of time except for the provision of Rule 19.5 of the Rules of this Court, the issues presented therein are properly before this Court only if it grants the petition in No. 88-1426, on which they depend. See Sup. Ct. R. 20.5. The constitutional issues presented by cross-petitioners are, in any event, without merit.

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of the improvements, compounding its initial error in breaching the United States' sovereign immunity. See *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

Since the Court has once denied review of the improvements issue in this case and the Tribe's petition does not question the individual defendants' right to be paid for their improvements, the government has concluded not to seek review of the improvements or prejudgment interest issues in this case—though these issues may well warrant this Court's attention if they should arise in another quiet title action by the United States.

[13] Indeed, the improvements made the land suitable for farming, and the escrow fund consists of the net proceeds from farming.

a. Conditional cross-petitioners in No. 88-1592, individual defendants who occupied Barrett Survey Area lands,[14] contend that 25 U.S.C. 194 unconstitutionally placed the burden in this litigation upon them as "white person[s]" to prove their title to the trust lands. They argue that this statute constitutes invidious racial discrimination favoring Indians and Indian tribes and deprives them of due process in violation of the Fifth Amendment. As cross-petitioners frankly acknowledge (88-1592 Pet. 4), this identical issue is one the Court declined to accept when it granted certiorari in *Wilson* v. *Omaha Indian Tribe, supra.* Instead, without finding it necessary to give separate consideration to that issue and without expressing any doubts as to Section 194's constitutionality, the Court held that it applies to these cross-petitioners (442 U.S. at 653). *Wilson* thus demonstrates that cross-petitioners' constitutional objections to Section 194 are insubstantial and do not warrant this Court's plenary consideration.

As the Court found in *Wilson*, Section 194 was enacted to address the serious problem of "recurring trespass upon and illegal occupancy of Indian territory," and "to protect the rights of Indians to their properties." 442 U.S. at 664. The Court's opinion leaves no room for doubt that "the purpose of th[is] provision—that of preventing and providing remedies against non-Indian squatters on Indian lands," *id.* at 667—is a legitimate end, or that Section 194 represents a rational and appropriate means of securing that end.[15] Indeed, the result in this case confirms that

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[14] The individual defendants occupied both Indian trust lands and fee-patented lands in the Barrett Survey Area.

[15] The State's argument notwithstanding (88-1636 Pet. 12-13), there is a plain and rational connection between the undisputed former status of this area as part of the Omaha Reservation and the statutory presumption that it remains so today. Section 194 "is triggered" only

Section 194 in fact serves to fulfill the federal government's special obligation to Indians and does not produce "invidious" consequences.

The individual cross-petitioners acknowledge (88-1426 Wilson et al. Br. in Opp. 4) that the Barrett Survey Area (within which the trust lands they claim are located) "was indisputably part of the Tribe's reservation in the 1860s." Their claim is that "the movements of the Missouri River * * * *destroyed the status of the land as reservation land*" (*ibid.* (emphasis added)). Cross-petitioners lost below simply because they could not prove by a preponderance of the evidence that this was so. Section 194 merely imposed upon them the burden to prove their contention that the reservation status of these lands had been "destroyed"—the same burden they would have had to shoulder if they had sued as plaintiffs for this land.[16] This

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after "the Tribe makes out a prima facie case of prior possession or title," *Wilson*, 442 U.S. at 668, and operates only to establish a rebuttable "presumption of [Indian] title," 25 U.S.C. 194. Thus, Indians remain as subject to "loss or gain from river movements as are other riparian owners" (88-1636 Pet. 13), even though Section 194 requires non-Indians who claim lands formerly in Indian ownership or possession to carry the burden of proof—and risk of non-persuasion—on the issue whether river movements have divested the Indians of ownership.

[16] Individual cross-petitioners assume that their status as defendants in this civil action entitles them as a matter of constitutional right to have the burden of proof placed upon the plaintiffs. It is highly doubtful that cross-petitioners have a constitutional right to any particular allocation of that burden. See *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976) ("Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.").

Cross-petitioners do not contend that anything in 25 U.S.C. 194, or in the conduct of the lengthy proceedings below, deprived them of the opportunity to present fully any evidence to support their contention

result cannot be deemed unfair, much less an example of invidious discrimination.

Moreover, individual cross-petitioners' due process claim must be viewed in light of "the unique legal status of Indian tribes under federal law and [of] the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974). So viewed, Congress's judgment in adopting "legislation that singles out Indians for particular and special treatment" is to be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," *id.* at 554-555.[17]

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that the conceded former status of this area as part of the Omaha Indian Reservation had been destroyed by the movements of the Missouri River. Cf. *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *U.S. Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973). Because there was no such deprivation, there is no merit to the State's argument (88-1636 Pet. 14-15) that Section 194 works a taking of property without the just compensation required by the Fifth Amendment. Section 194 does not interfere with the full adjudication of ownership disputes; it merely requires the non-Indian to shoulder the burden of proving his ownership by a preponderance of the evidence. Thus, contrary to the State's submission (88-1636 Pet. 14-15), Section 194 does not "transfer property" to the United States in violation of the Takings Clause. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 291 (1983) (rejecting claim that the Quiet Title Act's statute of limitations works a compensable "taking"). Unlike the time bar in *Block*, Section 194 permits, rather than prevents, judicial determinations of title based upon all probative evidence of title. To quiet title once all the evidence is considered is not, of course, to "transfer" title but to resolve the parties' ownership dispute.

[17] The Court reaffirmed this analysis in *United States* v. *Antelope*, 430 U.S. 641, 645 (1977) (footnote omitted):

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such,

In order to safeguard a vital tribal resource against questionable claims, Section 194 provides that a non-Indian claimant has the burden of proof when an "Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." Thus, Section 194, like the other special Indian legislation this Court has upheld, is directly related to the fulfillment of the government's special obligations to the Indians by protecting their most valuable property—their lands.[18] In an analogous context, this Court has approved a congressional reallocation of the burden of proof in a fashion designed to serve important federal policies. *Georgia* v. *United States*, 411 U.S. 526, 538 n.9 (1973) (Voting Rights Act places burden upon covered states to prove that proposed electoral changes are not discriminatory in purpose or effect); *City of Rome* v. *United States*, 446 U.S. 156, 183 n.18 (1980) (same).

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is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

The State cross-petitioners thus are incorrect in asserting (88-1636 Pet. 12) that because Section 194 singles out Indians for special treatment, it is "inherently suspect and subject to strict judicial scrutiny".

[18] Section 194 would therefore clearly pass muster not only under the test of *Morton* v. *Mancari*, *supra*, but also under the two-fold test of *Fullilove* v. *Klutznick*, 448 U.S. 448, 473 (1980), which individual cross-petitioners urge is applicable here (88-1592 Pet. 12-13). This test asks simply whether the objectives of the federal legislation are within Congress's power and whether the statute's limited use of a racial criterion is a permissible means to carry out that objective. See *City of Richmond* v. *Croson*, 109 S. Ct. 706, 717-718 (1989), discussing *Fullilove*. Here, Indians and Indian tribes are citizens for whom the United States holds lands in trust—a unique relationship—and Section 194 serves to carry out the government's trust obligations by pro-

b. The conditional cross-petition filed by the State of Iowa argues (88-1636 Pet. 9, 16) that, if the Tribe's petition is granted, this Court should also consider whether 25 U.S.C. 194 may constitutionally be applied to limit the rights of the State.

This Court has already held in this case that Section 194 does not apply with respect to the lands to which the State claims title (*Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 666-668, 678); the State seeks review of the constitutionality of the application of Section 194 to its claims only in the event that a grant of the Tribe's petition puts the State at risk that the Court will "effectively overrule" *Wilson* on this point (88-1636 Pet. 9). As we have demonstrated, the Tribe's petition presents nothing to suggest that it is appropriate for this Court to reconsider *Wilson*, so there is no occasion to consider the State's objections to an application of Section 194 this Court rejected at an earlier stage of this very case.

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tecting Indian lands from the claims of non-Indians whose title cannot be established by a preponderance of the evidence. This Court's decision in *Wilson* leaves no room for doubt that Section 194 is a measure that Congress could constitutionally employ to that end, although it may be, as Justice Blackmun observed in his concurrence in *Wilson* (442 U.S. at 680-681), that Section 194 should be construed to apply in all disputes between Indians and any non-Indian—not simply any "white person"—in order to avoid creating an "irrational racial classification highly questionable under the Fifth Amendment's equal protection guarantee."

CONCLUSION

The petition for a writ of certiorari in No. 88-1426 and the conditional cross-petitions in Nos. 88-1592 and 88-1636 should be denied.

Respectfully submitted.

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